91 1058

No. _____

In The

Supreme Court of the United States

October Term, 1991

HAYDEE McBRIDE,

Petitioner,

vs.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the holding of the Board of Immigration Appeals that an alien can only accrue the required seven years of unrelinquished domicile *subsequent* to the granting of permanent residence violates the plain meaning of Section 212(c) of the Immigration and Nationality Act [8 U.S.C. 1182(c)].

LIST OF PARTIES

The only parties to this case are those reflected in the caption of the case, to-wit: Haydee McBride and the Immigration & Naturalization Service.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Review is sought of the opinion of the Tenth Circuit Court of Appeals in *McBride v. INS* (not selected for official publication) (filed September 5, 1991) appearing at pages App. 3 – App. 5 of the Appendix.

On November 22, 1991, the United States Court of Appeals for the Tenth Circuit denied the Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc*. This Order of the United States Court of Appeals for the Tenth Circuit appears at pages App. 1 – App. 2 of the Appendix.

The decision by the Board of Immigration Appeals in the instant case was filed on January 23, 1991 and appears at pages App. 6 – App. 9 of the Appendix.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit rendered its judgment against the Petitioner on September 5, 1991. App. 3 – App. 5. The Petitioner's Request for Rehearing was denied on November 22, 1991. App. 1 – App. 2.

This Honorable Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the United States Court of Appeals for the Tenth Circuit was based on 8 U.S.C. 1105(a), which vests a circuit court of appeals with exclusive jurisdiction to review a final order of deportation.

STATUTORY PROVISION UPON WHICH THE INSTANT CASE IS BASED

Section 212(c) of the Immigration and Nationality Act [8 U.S.C. 1182(c)] states the following:

> Aliens lawfully admitted for permanent residence . . . who are returning to a lawful unrelinquished domicile of seven consecutive years may be admitted [to the United States] in the discretion of the Attorney General . . .

STATEMENT OF THE CASE

Facts of the Case

The Petitioner, Mrs. Haydee McBride, is a native and citizen of Venezuela who is married to an American citizen and has two American citizen children. Mrs. McBride obtained permanent resident status based upon her marriage to her American citizen spouse.

At her deportation hearing, Mrs. McBride argued that she was eligible for a waiver of deportation, under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), having resided in the United States for more than seven years, including time prior and subsequent to her receipt of lawful permanent residence.

Although the order to show cause revealed an entry date of July 1985, counsel for Mrs. McBride made an offer of proof that she had been residing in the United States since July of 1982 and that evidence was available, in court, to prove that fact. The Immigration Judge cut-short counsel's offer of proof indicating that the evidence was not relevant given established BIA precedent which requires the accrual of seven years subsequent to the granting of permanent residence status.

Relying on this precedent, the Immigration Judge ruled that the requirement of seven years of unrelinquished lawful domicile set forth in § 212(c) of the Act can only be accrued subsequent to the granting of lawful permanent residence.

Proceedings in the Case

On June 9, 1989, an Order to Show Cause was served on the Petitioner alleging deportability pursuant to

§ 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11). On November 6, 1989, a deportation hearing was held in Mrs. McBride's case, at which time the Immigration Judge found Mrs. McBride deportable, and found her to be ineligible for relief under § 212(c) of the Immigration and Nationality Act.

On November 9, 1989, Mrs. McBride filed an appeal to the Board of Immigration Appeals. On January 23, 1991, the Board of Immigration Appeals affirmed the Immigration Judge's decision in the Petitioner's case, and on February 20, 1991, the Petitioner filed a Petition for Review with the United States Court of Appeals for the Tenth Circuit.

On September 5, 1991, the United States Court of Appeals issued its decision in which it refused to adopt the holding of the Second Circuit in *Tim Lok v. INS*, 548 F.2d 37 (2d Cir. 1977); and, relying on *Avila-Murrieta v. INS*, 762 F.2d 733, 734 (9th Cir. 1985), ruled that the seven years of required lawful unrelinquished domicile may only be accrued subsequent to the granting of lawful permanent residency.

On October 9, 1991, the Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, urging the United States Court of Appeals to reconsider its summary opinion and urging it to adopt the reasoning and holding of the Second Circuit in *Tim Lok v. INS*, 548 F.2d 37 (2d Cir. 1977).

On November 22, 1991, the United States Court of Appeals for the Tenth Circuit denied the Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc*.

REASONS FOR GRANTING THE WRIT

A. A True, Direct, Intolerable and Irreconcilable Conflict Exists Between The Decision Below And Decisions Rendered By Other Courts Of Appeal.

There is a definite and irreconcilable split among the Circuits with respect to the accrual of the seven years of lawful unrelinquished domicile, which is a prerequisite for applying for a waiver of deportation under § 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1982).

Section 212(c) states the following:

> Aliens lawfully admitted for permanent residence . . . who are returning to a lawful unrelinquished domicile of seven consecutive years may be admitted [to the United States] in the discretion of the Attorney General . . .

8 U.S.C. 1182(c) (1982).

In *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), the Second Circuit applied this ground for relief to individuals in deportation hearings. In *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976), the Board adopted *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), on a nationwide basis. Since 1976, therefore, an individual who is deportable from the United States may seek a waiver of deportation under § 212(c). If the individual's application for this waiver is granted, he or she will be spared deportation from this country.

On its face, § 212(c) seems clear. In order to establish eligibility for this relief, an alien must show both admission for permanent residence and an unrelinquished

domicile of seven years. These phrases appear as separate and distinct conditions, and there is nothing to indicate that one phrase is intended to modify or to limit the other. *See,* "Lawful Domicile Under Section 212(c) of the Immigration and Nationality Act", 47 *University of Chicago Law Review* 771 (1980). Moreover, a plain reading of the statute would indicate that a person must have seven years of lawful unrelinquished domicile and must also be a permanent resident alien. There is nothing in the text of the provision that suggests that the seven years of lawful domicile can only be accumulated subsequent to obtaining permanent resident status.

Notwithstanding the plain meaning of the statute, in the case of *Matter of S,* 5 I. & N. Dec. 116 (BIA 1953), the Board of Immigration Appeals adopted a highly restrictive interpretation of §212(c), ruling that the seven years of lawful domicile must occur subsequent to the granting of permanent residence. In numerous cases over the years, the Board has steadfastly reaffirmed this holding. *Matter of Lok,* 15 I. & N. Dec. 720 (BIA 1976); *Matter of Anwo,* 16 I. & N. Dec. 293 (BIA 1977); *Matter of Newton,* 17 I. & N. Dec. 133 (BIA 1979).

In 1977, the Second Circuit adopted a more literal and expansive interpretation of §212(c). *See, Lok v. INS,* 548 F.2d 37 (2d Cir. 1977). Underscoring the draconian nature of deportation, the fact that deportation statutes must be construed in favor of the alien, and after reviewing the predecessor statutory enactments, the Second Circuit struck down the Board of Immigration Appeals' ruling that the seven years of lawful unrelinquished domicile can only be accrued or accumulated subsequent to the granting of lawful permanent residence. *Id.*

Specifically, the Second Circuit pointed out that the phrase "lawfully admitted for permanent residence," which is clearly defined in the statute, does not bear the same meaning as "lawful unrelinquished domicile." *Id.*, at 40. As the Immigration Service admitted during oral argument, it is quite possible for an alien to establish lawful domicile without being admitted for permanent resident status. Additionally, the Immigration & Naturalization Service conceded that "the bare wording of the statute does not require the alien to accumulate his seven years of domicile after he is admitted to the country on a permanent basis." *Id.* at 39. Finally, the Second Circuit indicated that it was "baffled" by the Board's interpretation, especially in light of the fact that the Immigration & Naturalization Service had not been able to cite anything in the statute or in the legislative history to support its position. *Id.* at 41.

In conclusion, the Second Circuit, ruled that the two terms "unrelinquished domicile" and "admitted for permanent residence" should be considered and satisfied separately, and that the Board of Immigration Appeals' ruling that the seven years must occur subsequent to the granting of permanent residence must be overturned. *Id.*

In *Lok v. INS*, 681 F.2d 107 (2d Cir. 1982), the Second Circuit revisited Mr. Lok's case. In so doing, the Second Circuit refined its earlier decision while still maintaining that the two terms "unrelinquished domicile" and "admitted for permanent residence" should be considered and satisfied separately. In the second *Lok v. INS* case, the Second Circuit cited this Honorable Court's decision in *Elkins v. Moreno*, 435 U.S. 647, 665-68 (1978), as

implicitly endorsing its holding in the first *Lok v. INS* case. *Lok v. INS*, 681 F.2d at 109.

Five other Circuit Courts of Appeal have had occasion to address this issue. The Ninth Circuit, in *Castillo-Felix v. INS*, 601 F.2d 459 (9th Cir. 1979), and the Fourth Circuit in *Chiravacharadhikul v. INS*, 645 F.2d 248 (4th Cir. 1991), declined to follow the Second Circuit's holding in the first *Lok v. INS* case. It should be noted that these two decisions were rendered prior to the Second Circuit's decision in the second *Lok v. INS* case, although the Ninth Circuit decision in *Castillo-Felix* was affirmed in *Avila-Murrieta v. INS*, 762 F.2d 733, 734 (9th Cir. 1985), without any further discussion. It is quite possible that the Fourth and Ninth Circuits might have been persuaded by the reasoning of the Second Circuit in the second *Lok v. INS* case, had they been able to consider that decision prior to reaching their decision. In any event, both decisions were punctuated by highly-persuasive dissenting opinions which urged the majority to adopt the holding of the first *Lok v. INS* case.

The Fifth Circuit in *Brown v. US INS*, 856 F.2d 758 (5th Cir. 1988); the D.C. Circuit in *Anwo v. INS*, 607 F.2d 435, 437-438 (D.C. Cir. 1979); and the Third Circuit in *Reed v. INS*, 756 F.2d 7, 9 (3d Cir. 1985), and *Dabone v. Karn*, 763 F.2d 593, 598 (3d Cir. 1985) appear, at least implicitly, to endorse, in part, the holdings of the Second Circuit in the first and second *Lok v. INS* cases.

In the instant case, counsel for Mrs. McBride made an offer of proof and attempted to introduce evidence demonstrating the establishment of lawful unrelinquished domicile beginning in July of 1982. The Immigration

Judge ruled that this evidence was not relevant given established BIA precedent.

In response to the decision of the BIA, the petitioner argued before the Tenth Circuit that counsel's offer of proof and attempt to introduce evidence regarding the establishment of lawful unrelinquished domicile preserved the issue for appeal and the Tenth Circuit agreed.

In summary, a true, direct, intolerable and irreconcilable conflict exists between the decision below and decisions rendered by other Circuits, particularly the Second Circuit, and, as a result, there exists a conflict which must be resolved by this Honorable Court. Consequently, the instant Petition for Certiorari should be granted.

B. The Decision Below Is An Important And Recurring Issue That Demands Resolution By This Honorable Court.

The conflict between the Circuits, discussed previously, has existed for more than fourteen years and needs to be resolved.

Relief under §212(c) of the Immigration and Nationality Act is often the only waiver available to permanent residents who face deportation and permanent banishment from the United States. There are hundreds, if not thousands, of permanent residents whose ability to remain in the United States is dependent upon the resolution of this issue.

The Petitioner is a first-time offender who was found guilty of simple possession of cocaine. She is married to a

United States citizen, has two United States citizen children, and has resided in the United States for more than nine years. Unless this Petition for Certiorari is granted, she will be deported and permanently banished from the United States, with no hope of returning to this country. A similar fate awaits other, similarly-situated permanent resident aliens, unless this Petition is granted.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the decision of the Tenth Circuit Court of Appeals in this case.

Respectfully submitted,

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December 1991

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HAYDEE MCBRIDE, Petitioner,	)	
v.	)	No. 91-9508
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	)	

ORDER
Entered November 22, 1991

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges.

This matter comes on for consideration of petitioner's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and

no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

HAYDEE MCBRIDE, Petitioner, vs. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	)	No. 91-9508 On Petition for Review of an Oder of the Board of Immigration Appeals (BIA No. A26 907 388)

ORDER AND JUDGMENT*

(Filed Sept. 5, 1991)

Before LOGAN, MOORE and BALDOCK, Circuit Judges.**

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case therefore is ordered submitted without oral argument.

Petitioner Hayde McBride petitions for review of a final order of the Board of Immigration Appeals (BIA) dismissing her appeal from an immigration judge's decision finding her deportable and denying her request for a waiver pursuant to § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). Our jurisdiction arises pursuant to 8 U.S.C. § 1105a(a) and 28 U.S.C. c. 158.

Petitioner, a Venezuelan citizen, became a lawful permanent resident of the United States on December 18, 1985. After petitioner was convicted of a controlled substance offense in 1989, the Immigration and Naturalization Service initiated deportation proceedings against her. The subsequent ruling finding her deportable is not at issue. Instead, petitioner challenges the BIA's interpretation of the § 212(c) discretionary waiver. An alien is eligible for the waiver if she has been "lawfully admitted for permanent residence" and has since accumulated "lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. § 1182(c). The petitioner urges us to interpret the statute as allowing eligibility for any alien who has been lawfully admitted as a permanent resident and has accrued seven years of residency in any lawful status regardless of when the seven years accrued, before or after lawful permanent residency. *See Tim Lok v. INS*, 548 F.2d 37 (2d Cir. 1977). The BIA interpretation, on the other hand, requires the seven years residency to accrue subsequent to the date of lawful permanent residency. This latter interpretation is in accordance with our holding in *Michelson v. INS*, 897 F.2d 465, 469 (10th Cir. 1990) ("The seven year period runs from the time the alien is admitted to permanent residence status.") (citing *Avila-*

Murrieta v. INS, 762 F.2d 733, 734 (9th Cir. 1985). Defendant has not complied with the seven-year requirement and has not distinguished this case from our holding in *Michelson*. Accordingly, the petition is DENIED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

(SEAL) **U.S. Department of Justice**
Executive Office for Immigration Review
Board of Immigration Appeals

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

Kenneth H. Stern, Esquire
1763 Franklin Street
Denver, Colorado 80218

MCBRIDE
A26 907 388

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very truly yours,

/s/ David L. Milhollan
David L. Milhollan
Chairman

Enclosure

Panel Members:

DAVID L. MILHOLLAN

FRED W. VACCA

/s/ Michael H. Bennett

File: A26 907 388 – Denver Date: JAN 23 1991

In re: HAYDEE MCBRIDE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Kenneth H. Stern, Esquire
1763 Franklin Street
Denver, Colorado 80218

ON BEHALF OF SERVICE:

Elizabeth B. Richards
General Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] – Convicted of narcotics violation

APPLICATION: Waiver of inadmissibility

ORDER:

PER CURIAM. The respondent appeals from the November 6, 1989, decision of the immigration judge finding her deportable and denying her request for a waiver under section 212(c) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1182(c). The request for oral argument is denied and the appeal will be dismissed.

The respondent is a 40-year-old native and citizen of Venezuela who entered the United States with a nonimmigrant visa July 21, 1985. She then became a lawful permanent resident on December 18, 1985. Her deportability is not at issue on appeal. The respondent conceded the charging allegations in the order to show cause. Accordingly, deportability has been established by clear,

unequivocal and convincing evidence as required by *Woodby v. INS*, 385 U.S. 276 (1966). *See also* 8 C.F.R. § 242.14(a). The respondent requested a waiver of deportation pursuant to section 212(c) of the Act.[1]

Her application for the discretionary relief of a waiver of deportation was denied because of her statutory ineligibility. On appeal the respondent requests that the Board reconsider its prior holdings requiring the respondent to be in lawful permanent resident status for seven years prior to allowing an application for relief. The respondent contends, rather, that an alien in any lawful status, even as a nonimmigrant should be able to accrue lawful status the seven years required by the Act prior to obtaining eligibility for 212(c) relief. This Board has consistently held that the seven years must accrue after the alien becomes a lawful permanent resident. One circuit has construed this section of the Act to merely require lawful status, and accordingly allows seven years of lawful status to accrue whether the alien is in immigrant or nonimmigrant status. *See Tim Lok v. INS*, 548 F.2d 37 (2d Circuit 1977). It is that holding which the respondent asks us to adopt, although that circuit's precedent is not applicable in this instance. Even if it were, the respondent still has not demonstrated statutory eligibility for the 212(c) waiver. Accordingly, the evidentiary deficiency

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[1] Aliens lawfully admitted for permanent residence may apply for a section 212(c) waiver of inadmissibility although they are in deportation, rather than exclusion proceedings. *See Francis v. INS*, 532 F.2d 263 (2d Cir. 1976); *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976).

of the record precludes this Board from even considering the issue, and the question is not properly before us.

The order to show cause indicates that the respondent entered the United States as a nonimmigrant in July of 1985 and became a permanent resident in December of that year. She is still two years short of qualifying for the relief she seeks, and even under *Tim Lok's* interpretation of the Act she is a year and a half from qualifying for a waiver. There is no proof in the record to demonstrate that she arrived in 1982 as her counsel represented to the immigration judge If there is proof, it was incumbent upon the respondent to provide the information to the judge. *See, e.g., Matter of Anderson,* 16 I&N Dec. 596, 597 (BIA 1978). She has not done so. Accordingly, the appeal is completely without merit as she has failed to demonstrate her eligibility for the relief under any construction of the Act. Based on the order to show cause regarding the length of time she was in the country as a lawful permanent resident the immigration judge correctly determined that the respondent was unable to qualify for relief. His decision is affirmed and the appeal is dismissed.

/s/ David L. Milhollan
FOR THE BOARD

No. 91-1058

In the Supreme Court of the United States

OCTOBER TERM, 1991

HAYDEE MCBRIDE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), authorizes the Attorney General to grant certain discretionary relief to aliens who have had a "lawful unrelinquished domicile" in the United States for "seven consecutive years." The issue in this case is whether time spent in the United States as a nonimmigrant visitor may be used to establish that an alien has had a "lawful unrelinquished domicile" for the seven-year period.

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OCTOBER TERM, 1991

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IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-5) is unpublished, but the judgment is noted at 943 F.2d 57 (Table). The decision of the Board of Immigration Appeals (Pet. App. 7-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1991. The court of appeals denied a petition for rehearing on November 22, 1991. Pet. App. 1-2. The petition for a writ of certiorari was filed on December 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATMENT

1. Petitioner is a native and citizen of Venezuela. She entered the United States in July of 1985 as a nonimmigrant visitor under 8 U.S.C. 1101(a)(15)(B), which covers an alien "having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure." In December of 1985, she became a lawful permanent resident. In May of 1989, she was convicted in a Colorado state court of possession of a controlled substance. Pet. App. 7; AR 33-35, 41, 44.[1]

2. In June of 1989, the Immigration and Naturalization Service (INS) charged petitioner with being deportable from the United States under 8 U.S.C. 1251(a)(11), which authorizes deportation of an alien who is "convicted of a violation of * * * any law * * * of a State * * * relating to a controlled substance."[2] At the deportation hearing in November 1989 (about four years after petitioner became a permanent resident), petitioner was found deportable as charged, but requested relief under 8 U.S.C. 1182(c), which authorizes the Attorney General to grant certain discretionary relief to "[a]liens lawfully admitted for permanent residence * * * [who have] a

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[1] "AR" refers to the Administrative Record filed in the court of appeals.

[2] This provision was renumbered by Section 602 of the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, 104 Stat. 5077-5082, and now appears as 8 U.S.C. 1251(a)(2)(B) (Supp. II 1990). The amendment, though, does not apply to deportation proceedings commenced before March 1, 1991. See IMMACT § 602(d), 104 Stat. 5082.

lawful unrelinquished domicile [in the United States] of seven consecutive years." [3]

In order to demonstrate that petitioner met the seven-year requirement of the statute, her counsel made an offer of proof that her first entry had occurred in 1982 and that "she had a visitors visa, * * * and she had been residing in the United States and had made trips, short trips back" between 1982 and 1985. AR 36. The immigration judge did not resolve this factual question, but instead denied relief on the basis of the administrative rule, first set forth in *In re S—*, 5 I. & N. Dec. 116, 118 (BIA 1953), that time before the acquisition of permanent resident status does not count toward the seven-year lawful-domicile requirement. AR 24-25.

3. The Board of Immigration Appeals affirmed. Pet. App. 7-9. It noted that it "has consistently held that the seven years must accrue after the alien becomes a lawful permanent resident." *Id.* at 8. Because petitioner clearly had not been a permanent resident for seven years, she was not entitled to relief. Moreover, the BIA questioned whether petitioner had even offered satisfactory evidence to show seven years of residence in any immigration status, and accordingly concluded that she would not have

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[3] Although the statute on its face only authorizes the Attorney General to admit aliens returning to such a domicile, the Board of Immigration Appeals and various courts of appeals have concluded that the Section also authorizes the Attorney General to grant relief from deportation. See *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981); *Francis* v. *INS*, 532 F.2d 268, 270-273 (2d Cir. 1976); *In re Silva*, 16 I. & N. Dec. 26, 28-30 (BIA 1976); see also *id.* at 32 (Appleman, concurring) (noting that this interpretation of Section 1182(c) "may be desirable, but it is not what Congress wrote, nor what it intended").

been entitled to relief even if it had counted all of her time in this country. *Id.* at 9.

4. The court of appeals denied petitioner's petition for review in an unpublished judgment order. Pet. App. 3-5. The court noted that it had held in *Michelson* v. *INS*, 897 F.2d 465 (10th Cir. 1990), that the seven-year period for eligibility under Section 212(c) "runs from the time the alien is admitted to permanent residence status." Pet. App. 4 (quoting *Michelson*, 897 F.2d at 469). Because petitioner had not met the seven-year requirement, the petition for review was denied.

ARGUMENT

The decision of the court of appeals is correct. Although the Second Circuit has rejected the Board's interpretation of the proper way to calculate the seven-year period under Section 212(c), petitioner would not be entitled to relief under the Second Circuit's decisions, or under the law of any of the other circuits. Accordingly, review by this Court is not warranted.

1. The language of the statute, considered in light of the context in which the statute was enacted and the consistent course of administrative interpretation, supports the decision of the court of appeals. The statute provides only that "[a]liens lawfully admitted for permanent residence * * * who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General." 8 U.S.C. 1182(c). In our view, it is logical to assume that the reference to the unrelinquished domicile as "lawful"—following closely on the initial clause, which limits the provision to aliens "lawfully" admitted for permanent residence—is intended to tie the circumstances in

which an alien can establish the requisite type of domicile to the alien's immigration status, so that the alien can establish the required residency period only by means of a domicile established after the alien is "lawfully admitted for permanent residence"; any domicile established when an alien is not "lawfully admitted for permanent residence" cannot be "lawful."

This reading of the statute gains support from the circumstances of its enactment. This provision —enacted as part of the Immigration and Nationality Act of 1952—replaced the "Seventh Proviso" to Section 3 of the Immigration Act of 1917, which granted similar relief to "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years." Act of Feb. 5, 1917, ch. 29, 39 Stat. 878. The Senate Report that preceded enactment of the INA made it clear that the purpose of the revised provision was to limit the Attorney General's discretion to grant relief to aliens "who came in through the front door, were inspected, lawfully admitted, established homes here, and remained for 7 years before they got into trouble." S. Rep. No. 1515, 81st Cong., 2d Sess. 382 (1950). To accomplish this purpose, Congress revised the 1917 statute in two ways: (1) by adding the initial clause, which limits the provision to "[a]liens lawfully admitted for permanent residence"; and (2) by adding the adjective "lawful" to qualify the types of unrelinquished domiciles that would support relief.

The BIA adopted this interpretation shortly after the INA was enacted, in *In re S—*, 5 I. & N. Dec. 116 (BIA 1953). In that case, the BIA reviewed the legislative history of the 1952 revision to the Seventh Proviso and concluded that:

> [T]his provision of law is available only to those lawfully resident aliens who are returning to an unrelinquished domicile of 7 consecutive years subsequent to a lawful entry. In other words, we construe the section to mean that the alien must not only have been lawfully admitted for permanent residence but must have resided in this country for 7 consecutive years subsequent to such lawful admission for permanent residence; and that not only the admission must be lawful but that the period of residence must be lawful.

Id. at 118. The BIA consistently has adhered to this interpretation. See, *e.g.*, *In re Anwo*, 16 I. & N. Dec. 293 (BIA 1977), aff'd on other grounds, *Anwo* v. *INS*, 607 F.2d 435 (D.C. Cir. 1979); *In re Newton*, 17 I. & N. Dec. 133 (BIA 1979); *In re Kim*, 17 I. & N. Dec. 144 (BIA 1979).[4] The BIA's interpretation is entitled to strong deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408 (1961). Accordingly, the BIA's interpretation should prevail. See *Castillo-Felix* v. *INS*, 601 F.2d 459 (9th Cir. 1979) (following *In re S—*); *Chiravacharadhikul* v. *INS*, 645 F.2d 248 (4th Cir.) (same), cert. denied, 454 U.S. 893 (1981); *Michelson* v. *INS*, 897 F.2d 465, 469 (10th Cir. 1990) (same).

2. Petitioner correctly notes that the Second Circuit adopted a contrary view in *Tim Lok* v. *INS*, 548

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[4] The BIA has not, however, adhered to this interpretation in cases arising in the Second Circuit, in deference to the contrary interpretation adopted by the Second Circuit in *Tim Lok* v. *INS*, 548 F.2d 37 (1977). See *In re Anwo*, 16 I. & N. Dec. at 298.

F.2d 37 (1977) (*Lok I*). Acknowledging the difficulty of the problem, see *id.* at 38, the *Lok I* court rejected the BIA's interpretation and concluded that any unrelinquished domicile that did not violate the immigration laws would satisfy Section 212(c), even if the domicile was established while the alien was not lawfully admitted for permanent residence. See *id.* at 39-40. In a second opinion dealing with Tim Lok's case, however, the Second Circuit seriously limited the import of its decision in *Lok I*. See *Tim Lok* v. *INS*, 681 F.2d 107 (1982) (*Lok II*). The court in *Lok II* explained that an alien can establish domicile in the United States only by "establish[ing] an intent to remain." *Id.* at 109. Furthermore, he can "establis[h] *lawful* domicile only when his intent to remain [is] legal under the immigration laws." *Ibid.* Because Tim Lok's initial presence in the United States was unlawful, he could not establish a lawful domicile. Accordingly, the Second Circuit denied Tim Lok's petition for review.

The limited reach of the Second Circuit's rule is evident from decisions of the Fifth and District of Columbia Circuits, which have affirmed BIA orders in this area on the theory that nonimmigrant students cannot establish a "lawful" domicile, without addressing whether the BIA's interpretation or the Second Circuit's should prevail. *Brown* v. *INS*, 856 F.2d 728, 730-731 (5th Cir. 1988); *Anwo* v. *INS*, 607 F.2d 435, 437-438 (D.C. Cir. 1979); see also *Lok II*, 681 F.2d at 109 n.3 (noting that nonimmigrant students cannot acquire a lawful domicile).[5] Because

[5] Petitioner wrongly suggests (Pet. 8) that the Third Circuit's decisions in *Dabone* v. *Karn*, 763 F.2d 593 (1985), and *Reid* v. *INS*, 756 F.2d 7 (1985), bear on the issue here. Those cases dealt with the question of when a permanent resident *stops* accruing time for Section 212(c) purposes as the result of being found deportable or excludable.

petitioner's status as a nonimmigrant visitor similarly depended on her "having a residence in a foreign country which [s]he has no intention of abandoning and [on her] visiting the United States temporarily for business or temporarily for pleasure," 8 U.S.C. 1101(a)(15)(B), she also could not acquire a domicile in the United States without violating her immigration status. See *Elkins* v. *Moreno*, 435 U.S. 647, 665 (1978) (noting that Section 1101(a)(15)(B) "expressly condition[s] admission * * * on an intent not to abandon a foreign residence, or, by implication, on an intent not to seek domicile in the United States"). Accordingly, petitioner would not have prevailed even in the Second Circuit. Hence, this case presents no occasion for the Court to resolve the conflict on which the petition relies.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992

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[6] In any event, as the BIA noted (Pet. App. 9), petitioner failed to introduce at the immigration hearing evidence to establish that she has resided in the United States in any manner for the requisite seven years; accordingly, whatever view one may take of the statute, it would remain unclear that petititioner was entitled to relief.

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